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**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION**

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EPILEPSY ASSOCIATION OF  
UTAH, a Utah non-profit corporation;  
CHRISTINE STENQUIST;  
DOUGLAS ARTHUR RICE; TRUCE,  
a Utah non-profit corporation;  
NATHAN KIZERIAN; SHALYCE  
KIZERIAN; ANDREW TALBOTT,  
M.D.,

Plaintiffs,

v.

GARY R. HERBERT, Governor of the  
State of Utah, in his official capacity;  
JOSEPH K. MINER, M.D., MSPH,  
Executive Director, Utah Department  
of Health, in his official capacity,

Defendants.

**MOTION TO REMAND CASE TO  
STATE COURT AND FOR THE  
AWARD OF ATTORNEY FEES,  
AND SUPPORTING  
MEMORANDUM**

Case No.: 2:19-cv-00360-DBP

Magistrate Judge Dustin B. Pead

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## MOTION

Pursuant to 28 U.S.C. § 1447(c), Plaintiffs, by and through their counsel, respectfully move the Court to (1) remand this case to the Utah state court from which it was wrongly removed by Defendants and (2) award Plaintiffs their attorney fees incurred as a result of the removal.

This motion is based on the grounds that (1) Defendants—not Plaintiffs—invoked the jurisdiction of this Court when they removed this case from state court; (2) contradictorily, shortly after invoking this Court’s jurisdiction by removing this case from state court to this Court, Defendants moved to dismiss the case on the ground that this Court does *not* have subject matter jurisdiction because Plaintiffs do not have Article III standing; (3) federal courts presume they lack jurisdiction unless the record demonstrates that they *do* have jurisdiction; (4) Defendants, as the parties who removed this case and thereby invoked this Court’s jurisdiction, have the burden of demonstrating federal jurisdiction, yet have failed to carry one iota of that burden; (5) because Defendants have argued that this Court lacks subject matter jurisdiction, the case must be remanded; and (6) since Defendants did not have an objectively reasonable basis for the removal, as they have established in their own Motion to Dismiss Amended Complaint [ECF 14] (“Motion to Dismiss”), and because Defendants had a duty to consider the Article III standing issue before they

removed the action to this Court, Plaintiffs are entitled to an award of attorney fees incurred as a result of the removal.

### SUPPORTING MEMORANDUM

#### **I. BECAUSE DEFENDANTS REMOVED THIS CASE FROM STATE COURT TO FEDERAL COURT, THEY HAVE THE BURDEN, WHICH THEY HAVE ABDICATED, TO ESTABLISH SUBJECT MATTER JURISDICTION.**

28 U.S.C. § 1441(a)<sup>1</sup> makes clear that removal from state court to federal court is appropriate only when a case could originally have been filed in federal court. Hence, if the removing parties cannot demonstrate that the federal court has Article III jurisdiction—or, *a fortiori*, if the removing parties affirmatively assert that the plaintiff does *not* have Article III standing,<sup>2</sup>—the case is not properly removable and, if removed, *must* be remanded to state court.

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<sup>1</sup> 28 U.S.C. § 1441(a) provides, in relevant part, as follows:

[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States . . . .

<sup>2</sup> Two aptly titled articles applicable to defendants who remove cases then argue the federal court does not have Article III jurisdiction, are: “You Can’t Have Your Cake and Eat It Too,” found at [https://www.lockelord.com/-/media/consumerfin\\_20180525\\_sevethcircuitwarnsdefendants\\_sargent.pdf?la=en&hash=7343478E761AE955CB736DB4CFD2F68C](https://www.lockelord.com/-/media/consumerfin_20180525_sevethcircuitwarnsdefendants_sargent.pdf?la=en&hash=7343478E761AE955CB736DB4CFD2F68C) and “Be Careful What You Wish for When Asserting Article III Standing Challenges,” found at <https://www.jdsupra.com/legalnews/be-careful-what-you-wish-for-when-78811/>.

Contrary to the facts and the law, Defendants argue in their Motion to Dismiss that “[a]s the parties trying to invoke this Court’s limited jurisdiction, Plaintiffs have the burden to establish standing.”<sup>3</sup> However, because the *Defendants* removed this case from state court, *they* are the parties who invoked federal jurisdiction and who have the burden of demonstrating this Court’s jurisdiction. *Daimlerchrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006) (“Because defendants removed the case from state court to District Court, plaintiffs were not initially the parties that invoked federal jurisdiction.”); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (“The party invoking federal jurisdiction bears the burden of establishing these [Article III standing] elements.” (alteration added)); *Collier v. SP Plus Corp.*, 889 F.3d 894, 896 (7th Cir. 2018) (“As the party invoking federal jurisdiction, [defendant] had to establish that all elements of jurisdiction—including Article III standing—existed at the time of removal.” (alteration added) (citation omitted));

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One court labelled a defendant’s similar strategy to be “contrarian” because it removed the case to federal court, then argued the court did not have Article III standing. *See Davis Neurology PA v. DoctorDirectory.com LLC*, 896 F.3d 872, 874 (8th Cir. 2018) (“The court thought Doctor Directory had taken a “contrarian position” by removing the case to federal court and then arguing that the federal court lacked subject matter jurisdiction. Citing doubt as to whether Davis Neurology had Article III standing, the district court concluded that remand was the proper course.”)

<sup>3</sup> Motion to Dismiss, 13.



*Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 447 (7th Cir. 2005) (“Whichever side chooses federal court must establish jurisdiction; it is not enough to file a pleading<sup>4</sup> and leave it to the court or the adverse party to negate jurisdiction.”); *Powder River Basin Resource Council v. Babbitt*, 54 F.3d 1477, 1485 (10th Cir. 1995) (“The party asserting jurisdiction ‘bears the burden of establishing these [Article III standing] elements.’” (citation omitted)); *Barnes v. ARYZTA, LLC*, 288 F. Supp. 3d 834, 838 (N.D. Ill. 2017) (“The burden of proving federal court jurisdiction is on Defendant, the party which removed this action to federal court.” (citation omitted)); *Richman Bros. Co. v. Amalgamated Clothing Workers of America*, 114 F. Supp. 185, 191 (N.D. Ohio 1953) (“The [removal] statute does not contemplate a result that permits a district court to remove a case which it is required to dismiss for want of jurisdiction.”).

Defendants have not only failed to carry a scintilla of their burden; they have entirely abdicated that burden by pleading exactly the opposite of what they have the burden to prove. Instead of making standing “affirmatively appear in the record,” as they are required to do, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (“[S]tanding . . . ‘must affirmatively appear in the record’ . . . [a]nd it is the burden

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<sup>4</sup> “‘Pleading’ in this context refers to Defendant’s notice of removal.” *Barnes v. ARYZTA, LLC*, 288 F. Supp. 3d 834, 838 (N.D. Ill. 2017).



of the ‘party who seeks the exercise of jurisdiction in his favor’ . . . to ‘allege . . . facts essential to show jurisdiction.’” (alterations added) (citations omitted)), Defendants argue at great length in their Motion to Dismiss, at 1–3, 11–36, that Plaintiffs do *not* have Article III standing. Instead of meeting the requirement that “those who invoke the power of a federal court [must] demonstrate standing,” *Already, LLC v. Nike, Inc.*, 566 U.S. 85, 90 (2013), Defendants do diametrically the opposite in their Motion to Dismiss. Hence, this case must be remanded to the state court from which it was removed.

**II. BECAUSE DEFENDANTS CONTEND PLAINTIFFS DO NOT HAVE ARTICLE III STANDING, THIS CASE MUST BE REMANDED TO STATE COURT.**

Although it is difficult to fathom, Defendants have apparently proceeded in this matter with the notion that, to achieve removal, it is sufficient for them to assert federal question jurisdiction. Then, after they *invoke* this Court’s jurisdiction, they seem to believe they are free to *challenge* that jurisdiction on the ground that Plaintiffs do not have Article III standing. However, removal does not work that way.

Removal is proper only when a case could originally have been filed in federal court. . . . [Defendant] reasons that was true of [Plaintiffs’] federal-law claim because § 1441(a) allows removal of cases over which federal courts would have had ‘original jurisdiction’ and 28 U.S.C. § 1331 grants district courts ‘original jurisdiction’ over claims ‘arising under’ a federal statute. *But reliance on the phrase ‘original*

*jurisdiction’ is not enough, because federal courts have subject-matter jurisdiction only if constitutional standing requirements also are satisfied.*

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Thus, to establish federal subject-matter jurisdiction, *[Defendant] must also show that [Plaintiffs] have Article III standing . . .* The [Defendant] disagrees and suggests that once removal based on a federal question gets a defendant’s foot in the door of a federal court, the slate is wiped clean and the defendant can challenge jurisdiction. But § 1447(c) makes clear that the district court must remand the case to state court if “at *any time* before final judgment it appears that the district court lacks subject matter jurisdiction.”

*Collier v. SP Plus Corporation*, 889 F.3d at 896 (alterations added) (emphasis added). *See also Hill v. Vanderbilt Capital Advisors, LLC*, 702 F.3d 1220, 1224 (10th Cir. 2012) (“Our court has repeatedly characterized standing as an element of subject matter jurisdiction.”).

Because Defendants have done just the opposite of carrying their burden to demonstrate that the federal court has subject matter jurisdiction, and because Defendants have not alleged “facts essential to show jurisdiction,” *FW/PBS, Inc. v. City of Dallas*, 493 U.S. at 231, remand of this case to state court is compelled. 28 U.S.C. § 1447(c) (“If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.”). *See also Int’l Primate Prot. League v. Adm’rs of Tulane Educ. Fund*, 500 U.S. 72, 89 (1991) (“[T]he literal words of § 1447(c), . . . on their face, give no discretion to dismiss

rather than remand an action.”); *Hansen v. Harper Excavating, Inc.*, 641 F.3d 1216, 1228 (10th Cir. 2011); *Fent v. Okla. Water Res. Bd.*, 235 F.3d 553, 557–58 (10th Cir. 2000) (“The plain language of § 1447(c) gives no discretion to dismiss rather than remand an action removed from state court over which the court lacks subject-matter jurisdiction.”); *Jepsen v. Texaco, Inc.*, No. 94–6429, 1995 WL 607630, at \*2, 1995 U.S. App. LEXIS 28809, at \*7, (10th Cir. October 16, 1995) (unpublished) (“Lack of standing divests the court of subject matter jurisdiction, and therefore, upon determining that [plaintiff] lacked standing to bring his suit, the court should have remanded the matter to state court pursuant to [§] 1447(c).”) (alterations added).

Where, as here, defendants in other cases “tried to have it both ways by asserting, then immediately disavowing, federal jurisdiction” by arguing that the plaintiffs did not have Article III standing, courts have remanded the cases to state courts without even undertaking a jurisdictional analysis. *Mocek v. Allsaints USA Ltd.*, 220 F. Supp. 3d 910, 914 (N.D. Ill. 2016). *See also Barnes v. ARYZTA, LLC*, 288 F. Supp. 3d at 839 (“Plaintiff does not have to take a position on the standing issue while Defendant does, because Defendant bears the burden of establishing jurisdiction in this Court.”); *Roberts v. Dart Container Corp.*, No. 17 C 9295, 2018 WL 3015793, \*1–2 (N.D. Ill. March 12, 2018).

### **III. PLAINTIFFS ARE ENTITLED TO AN AWARD OF THEIR ATTORNEY FEES INCURRED AS A RESULT OF THE REMOVAL BY DEFENDANTS.**

The United States Supreme Court has held that the standard for the award of attorney's fees when a court remands a matter previously removed is whether "the removing party has an objectively reasonable basis for removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 136 (2005).

In this matter, there was no objectively reasonable basis for removal of this case. The slightest legal research would have disclosed that if—as Defendants have spent dozens of pages in their Motion to Dismiss arguing—Plaintiffs lack Article III standing, then this Court, whose jurisdiction Defendants invoked, did *not* have jurisdiction. In other words, Defendants "tried to have it both ways by asserting, then immediately disavowing, federal jurisdiction," *Mocek v. Allsaints USA Ltd.*, 220 F. Supp. 3d at 914. The award of fees is particularly appropriate here in light of the following concerns:

The process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources.

*Martin v. Franklin Capital Corp.*, 546 U.S. at 140.

If Defendants believed, as they argue so strenuously at such great length in their Motion to Dismiss, that Plaintiffs do not have Article III standing and, hence,

this Court does *not* have subject matter jurisdiction, they could not have had *any* reasonable basis for removing this case in the first place. In *Collier v. SP Plus Corporation*, the defendant, like the Defendants in the instant case, asserted the federal court's jurisdiction when removing the case, then, on a motion to dismiss, argued the court did not have jurisdiction when it challenged plaintiffs' Article III standing. 889 F.3d at 895–96. The court in *Collier* appeared to deny the award of fees or expenses under § 1447(c) solely on the basis that plaintiffs' "brief does not adequately develop a basis to do so," but it sounded a stern warning to defendants contemplating removal that "[defendant's] justifications aside, its dubious strategy has resulted in a significant waste of federal judicial resources, most of which was avoidable."

Not only have federal judicial resources been wasted in this matter by reason of Defendants' wrongful removal of this case, but Plaintiffs' counsel has been required to spend substantial time reading and analyzing Defendants' extremely long Motion to Dismiss, researching the removal and remand issues, and drafting the Motion to Remand and Supporting Memorandum. The costs of those legal services, particularly under these circumstances, should be borne by Defendants.

For those reasons, Plaintiffs respectfully urge the Court to award attorney's fees to Plaintiffs, pursuant to 28 U.S.C. § 1447(c), in an amount to be determined,

upon the submission of one or more affidavits, after the Court rules on the motion to remand.

### **CONCLUSION**

Plaintiffs respectfully urge the Court to summarily remand this matter to the state court from which it was removed and to award Plaintiffs their attorney fees incurred as a result of the Defendants' wrongful removal.

DATED this 24th day of June 2019.

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